

# Washington Update

**November 11, 2010**

The EEOC issued [final Genetic Information Nondiscrimination Act \(GINA\) regulations](#) on November 9. The final regulations include a suggestion by IPMA-HR and other employer groups that a safe harbor be provided to employers who inadvertently receive genetic information in response to a request for medical information. The safe harbor will apply when the employer warns the healthcare provider not to include genetic information.

The Senate has scheduled a procedural vote on the Paycheck Fairness Act, S. 3772, for November 17. The measure passed the House of Representatives in January 2009. Of particular concern is the availability of unlimited punitive and compensatory damages. Public employers are exempt from punitive damages under Title VII and compensatory damages are capped for both public and private employers. IPMA-HR is concerned that the bill's focus on damages and limiting an employers defense will only increase litigation without addressing the wage gap.

**Mandatory Collective Bargaining** –Congress has yet to act on this piece of legislation despite early indications that it had the votes to pass and the support of the Obama Administration. IPMA-HR and several other local government associations have been [active opponents](#) of the measure (H.R. 413, S. 1611, S. 3194) which would require states to create collective bargaining laws for public safety and authorize a federal agency to determine when states are in compliance with a federal law – an unprecedented intrusion into state and local government police power. If a state fails to create a satisfactory bargaining law, that state will be subject to regulations developed by the Federal Labor Relations Authority (FLRA).

IPMA-HR joined other public sector groups in submitting testimony in opposition to H.R. 413 at the March 10, 2010 hearing before the House Subcommittee on Health Employment Labor and Pensions. IPMA-HR executive director Neil E. Reichenberg testified against the bill before a house subcommittee in the 110th Congress. Passage is uncertain but proponents are still optimistic that they can move the bills this session.

**Employer Provided Educational Assistance** - Section 127 of the Internal Revenue Code is set to expire at the end of 2010 unless Congress acts. Section 127 allows employees to exclude up to \$5,250 of employer-provided educational assistance for both graduate and undergraduate programs. In June 2010, Representatives Earl Pomeroy and Sam Johnson introduced H.R. 5600 to make Section 127 permanent. IPMA-HR joined the Coalition to Preserve Employer Provided Educational Assistance.

**Healthcare Reform** – In August 2010, IPMA-HR commented on the Interim Final Regulations on the status of Grandfathered plans under the new healthcare reform law and on the annual limits. The Departments of Treasury, Labor and Health and Human Services adopted the

regulations under the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act. The comments are available on the IPMA-HR [advocacy pages](#).

**Age Discrimination**– The EEOC issued a notice of proposed rulemaking on February 18, 2010 addressing the meaning of “reasonable factors other than age” (RFOA) under the Age Discrimination in Employment Act (ADEA).

The House Subcommittee on Health Employment Labor and Pensions held a hearing on May 5, 2010 on the [The Protecting Older Workers Against Discrimination Act \(H.R. 3721, S. 1756\)](#). The bill would overturn the Supreme Court's decision in *Gross v. FBL Financial* (2009). In Gross's case, a narrow Supreme Court majority said that it was not enough to show that age was a motivating factor of the employer's discriminatory action, but a plaintiff must show that age was the ‘but-for’ reason to win a case. The new standard made it more difficult for older workers to hold employers accountable than those alleging race, sex, national origin or religious discrimination.

**Mandatory OSHA Coverage** – A subcommittee hearing was held on March 16, 2010. The “Protecting America's Workers Act of 2009” (H.R. 2067) would apply federal safety standards to workers who are not currently covered, including federal, state, and local employees. IPMA-HR and other public sector organizations are working to oppose this unfunded mandate.

**IRS/Cell Phone**– On September 27, 2010 President Obama signed into law the small jobs bill that included a provision removing cell phones from “listed property.” As a result, employers do not have to charge employees for calls made on employer-provided cell phones. Prior to the change, employers were subject to penalties for not charging employees because cell phones were treated as an employment benefit.

**Genetic Information Nondiscrimination Act**– IPMA-HR [filed comments](#) on the EEOC's proposed regulations. The [final regulations](#) were issued on November 9, 2011. The law prohibits employers from discriminating against employees and applicants on the basis of genetic information and bans the collection of genetic information except in very limited circumstances. The EEOC created model language employers may use to warn healthcare providers against including genetic information in a response to a request for medical information:

Safe Harbor Model Language: “The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of employees or their family members. In order to comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. ‘Genetic information,’ as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.”

The [Genetic Information Nondiscrimination Act](#) became effective November 21, 2009.

**Paycheck Fairness Act** – On September 13, 2010 Senate Majority Leader Harry Reid (D-NV) introduced the Paycheck Fairness Act as S. 3772. The move allows the bill to be brought to a vote at any time. The House passed Paycheck Fairness in January 2009 as part of the Lilly Ledbetter Fair Pay Act. The bill stands a fair chance of passage this year. IPMA-HR has been working to oppose this legislation.

**Family and Medical Leave Act (FMLA) Expansion** – A comprehensive family leave bill was introduced on June 25, 2009 by Representative Woolsey (D-CA) that includes elements of several other FMLA expansion bills as well as the healthy families act and the violence against women act. The Balancing Act of 2009 (H.R. 3047) has 34 cosponsors. It would allow workers to take parental involvement leave, as in H.R. 824, sponsored by Representative Maloney (D-NY). This bill may become the vehicle for comprehensive family leave. Outlook for passage is unlikely during the remainder of this legislative session.

**ADA Amendments Act**– IPMA-HR, NPFLRA and IMLA filed [comments](#) on November 23, 2009 in response to the EEOC's proposed regulations. The comments urge the Commission to consider employer issues in the final regulations which are expected sometime this fall or early next year. The ADA Amendments Act reversed several Supreme Court opinions that narrowed the definition of a disability; the new law clarifies that "disability" should be interpreted broadly and provides a non-exhaustive list of major life activities. Disabilities should also be considered in their untreated states without the ameliorative effects of medication. The EEOC [proposed regulations](#) are online as is a [summary](#) of the law provided by the law firm of Proskauer Rose LLP.

**Healthy Families Act**- Legislation to require employers to provide paid sick leave was reintroduced in May 2009. The bills (H.R. 2460, S.1152) would require employers with 15 or more employees to provide one hour of paid sick leave per 30 hours worked up to a maximum of 56 hours per year. Paid time off programs would be allowed but other concerns still exist, such as the bill's requirement that a doctor's note not be required for leave unless the absences is for three or more consecutive days, that the commencement of the leave cannot be delayed if the note is not provided and the requirement that paid leave be made available to part-time and seasonal employees. Employees are entitled to use the leave after working for 60 days. Hearings have been held in House subcommittees.

**Employment Non-Discrimination Act (ENDA)** – The Employment Non-Discrimination Act (H.R. 3017, S. 1584) would ban employment discrimination on the basis of sexual orientation and gender identity. Hearings have been held by both House and Senate committees. The bills apply to both public and private sector employers. The bill has 202 cosponsors in the House and 45 in the Senate. In addition to strong bipartisan support in Congress there is a business coalition supporting the measure that includes companies such as Coca-Cola, Eastman Kodak, and Bausch & Lomb.

**GPO/WEP Reform**– Legislation (H.R. 235, S.484) was introduced this session that would repeal the government pension offset (GPO) and the windfall elimination provision (WEP). The GPO and the WEP operate to lower the Social Security benefits of an individual who earns a public pension but was not covered by Social Security. Elimination of the GPO and WEP is an

uphill battle as it would be expensive and some lawmakers believe that mandatory Social Security for all state and local government employees is the answer to the GPO/WEP issue. More information on the GPO and the WEP is available on the Social Security Administration's web site: <http://www.ssa.gov/gpo-wep/>

**Normal Retirement Age** – the IRS issued a notice announcing that it is delaying implementation of the normal retirement age regulations until 2013. The regulation would require state and local government plans to adjust or abandon their use of years of service when determining retirement age. The notice is available here: <http://www.irs.gov/pub/irs-drop/n-08-98.pdf>

## PERSONNEL

**H.B. 360 – Texas Municipal Retirement System (TMRS):** makes the following changes to the TMRS statute: (1) guarantees an annual interest credit of at least five percent to member accounts; (2) sets the annuity purchase rate for retirees at a minimum of five percent; (3) requires the crediting or charging of income or loss; (4) requires the interest fund to accurately reflect the determination and allocation of net investment income or loss; (4) requires annual determination of net investment income or loss based on generally accepted accounting principles; (5) changes the way money from the interest fund is allocated to other TMRS funds, including giving priority to allocating interest to the current service annuity reserve fund, the supplemental disability benefits fund, the supplemental death benefits fund, and the employee savings fund; (6) provides for adequate reserves to provide reasonable rate stabilization to cities; and (7) deletes the provision allowing for the treatment of certain stock gains as investment income that is added to the interest fund.

**H.B. 451 – Mandatory Health Benefit:** requires health benefit plans to cover autism in a child up to age nine. (Note: current law requires coverage up to age six.)

**H.B. 806 – Mandatory Health Benefit:** does the following: (1) requires that health benefit plans provide coverage for prosthetic devices, orthotic devices, and professional services related to the fitting, use, repair, and replacement of those devices; (2) provides that the coverage must equal the coverage provided under federal laws relating to health insurance for the aged and disabled; (3) prohibits annual dollar limits on prosthetic coverage; but (4) allows the health benefit plan to have copays, deductibles, and coinsurance on prosthetic coverage that are the same as those applied to other health conditions.

**H.B. 1177 – Legislative Leave:** expands the number of cities—from cities of 200,000 or more in population to cities of 50,000 or more in population—in which peace officers and firefighters are eligible for legislative leave under subchapter A of Chapter 614 of the Government Code.

**H.B. 1290 – Mandatory Health Benefit:** requires the issuer of a health benefit plan to provide up to \$200 in coverage for noninvasive tests for the detection of cardiovascular disease every five years for certain at-risk individuals.

**H.B. 1960 – Public Safety Pay:** requires a city to pay a firefighter or police officer for appearing as a witness at an administrative proceeding in the same manner that a firefighter or police officer would be paid for making an appearance as a witness in a criminal or civil suit.

**H.B. 2000 – Mandatory Health Benefit:** requires a health benefit plan to provide coverage for amino acid-based elemental formulas (typically formulas for infants and children with food allergies).

**H.B. 2068 – Peace Officer Identification Card:** requires a law enforcement agency to provide an identification card to any honorably retired peace officer who requests one.

**H.B. 2113 – Firefighters:** requires a city to “designate” September 11 as a holiday for its firefighters.

**H.B. 2360 – Income Tax Information:** requires a city to provide to its employees eligibility information relating to the federal earned income tax credit by March 1 of each year. The city must provide the information in person; through e-mail at the employee’s last known e-mail address; through a flyer included, in writing or electronically, as a payroll stuffer; or by mailing the information to the employee at the employee’s last known address by United States first class mail. The bill also requires the state comptroller to provide a form that includes information relating to the federal earned income tax credit for distribution by a city or other employer. Finally, the bill allows the Texas Workforce Commission to adopt rules regarding the information that a city or other employer must provide regarding the federal earned income tax credit.

**H.B. 2580 – Police Employment Web Site:** does the following: (1) requires the Texas Workforce Commission (TWC) to develop, maintain, and promote an Internet Web site relating to employment opportunities for police officers; (2) requires the TWC to contract with the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) to develop a license verification system to verify whether a police officer is licensed and in good standing; and (3) requires the TWC to enter into a contract with TCLEOSE to operate such a Web site if there are no funds for TWC to do so.

**H.B. 2806 – Civil Service Leave:** provides that, in a city covered by Chapter 143 of the Local Government Code (fire/police civil service), when a firefighter or police officer who was on a military leave of absence is reinstated and the reinstatement creates a surplus of personnel in the rank in which the returning firefighter or police officer was reinstated, the person with the least seniority in the surplus position must be moved to the position immediately below the position to which the returning firefighter or police officer was reinstated.

**H.B. 3001 – Employee Pay:** allows a Type A or Type B general law city to consider cost of living and longevity in determining an employee’s salary.

**H.B. 4560 – Staph Infection:** provides that notice must be given to a firefighter or emergency medical technician who is exposed to methicillin-resistant staphylococcus aureus (MRSA) by a hospital, a local

health authority, or by the city as employer. (Note: MRSA is a staph infection that is resistant to conventional treatment.)

**S.B. 39 – Mandatory Health Benefit:** does the following (1) requires that certain health benefit plans provide coverage for health care costs incurred in connection with certain clinical trials for the prevention, detection, or treatment of a life-threatening disease or condition; (2) allows the insurer to subject this coverage to a deductible, coinsurance, or copayment requirement comparable to other deductible, coinsurance, or copayment requirements applicable under the health benefit plan; and (3) prohibits an insurer from cancelling or refusing to renew an insured's policy solely because an enrollee in the plan participates in a clinical trial.

**S.B. 420 – Judge Evaluations:** prohibits a city from taking into account the source and amount of municipal court revenue when evaluating a municipal judge's job performance.

**S.B. 461 – Civil Service:** requires that individuals taking the entrance exam for a beginning position in a fire department covered by Chapter 143 of the Local Government Code (fire/police civil service) be between eighteen and thirty-six years of age.

**S.B. 872 – Health Coverage for Survivors:** does the following: (1) requires a city to provide health benefit coverage to the surviving spouse of a peace officer or firefighter killed in the line of duty at the same rate paid by current employees (meaning that if the city pays the entire premium, the surviving spouse would pay nothing); (2) allows an eligible survivor up to 180 days to apply for health coverage; (3) requires a city to provide an eligible surviving spouse coverage until the surviving spouse becomes eligible for federal Medicare benefits; (4) requires a city to provide an eligible minor coverage until the minor turns 18; (5) requires the city to provide two notices of eligibility for coverage; (6) includes trainees and training routines to the list of covered "line of duty" deaths that trigger required health benefit coverage for eligible survivors; and (7) gives eligible survivors who did not originally apply for coverage until March 1, 2010, to reapply for coverage.